

**Town of Amherst**  
**Zoning Board of Appeals - Special Permit**

*DECISION*

**Applicant:** Michaelle Biddle, represented by David Biddle and Attorney Mark Tanner

**Date application filed with the Town Clerk:** February 3, 2006

**Nature of request:** To appeal the Cease and Desist Order of the Building Inspector for the occupation of the property by Alpha Delta Phi Fraternity

**Address:** 382 North Pleasant Street (Map 11C, Parcel 118, R-G Zoning District)

**Legal notice:** Published on February 8 and 15, 2006 in the Daily Hampshire Gazette and sent to abutters on February 8, 2006.

**Board members:** Zina Tillona, Hilda Greenbaum and Jane Ashby

**Submissions:** The petitioner submitted a packet of “exhibits” and a position paper arguing that under Mass. General Law 40A, Section 3, the “Dover Amendment”, the fraternity is exempt from the Amherst Zoning Bylaw because the fraternity is a non-profit educational institution. The exhibits were:

- A. The ZBA decision, FY2005-00040, denying a Special Permit renewal to the petitioner because the petitioner and fraternity failed to comply with the conditions of the previous Special Permits issued by the Board, thus endangering the fraternity residents and the surrounding area.
- B. A letter dated 1/5/06 from the Assistant Building Commissioner Mark Snow stating that the use of the house as a fraternity was in violation of the Amherst Zoning Bylaw, Section 3.326, and issuing a Cease and Desist order, giving the petitioner 30 days in which to correct the violation.
- C. A letter dated 12/17/42 from the U.S. Treasury Department Deputy Commissioner stating that the Alpha Delta Phi Fraternity and its chapters are exempt from federal income tax
- D. A letter dated 9/13/87 from the Internal Revenue Service of the U.S. Treasury Department stating that the Alpha Delta Phi Fraternity and its subordinate units are tax-exempt under the 1954 Code, Section 7
- E. A document written by Bill Carey, dated 6/12/87 outlining the Alpha Delta Phi Mission – 5 sections of Social and Ethical goals, 6 Leadership goals, one Scholastic goal, one Service goal, and one Literary goal.
- F. A statement from the University of Massachusetts dated January 2005, stating that a fraternity house may be considered “Approved Housing” as long as they meet standards such as health and safety code compliance, neighborhood standards, supervisory Standards, and code of student conduct throughout the year.
- G. The Greek Life Mission statement from the UMass Office of Fraternities and Sororities, dated 2005
- H. General Requirements Summary for UMass fraternities, source unknown, undated.

Town staff submitted the following:

- A letter from Town Counsel Alan Seewald to the Planning Department dated 2/25/03 stating that non-profit educational uses under M.G.L. c40A, Section.3 requires a determination that the educational component of a particular use is the primary or dominant component of that use.
- A letter dated 1/5/06 from the Assistant Building Commissioner Mark Snow to Ms. Biddle stating that the use of the house as a fraternity was in violation of the Amherst Zoning Bylaw, Section 3.326, and issuing a Cease and Desist order, giving the petitioner 30 days in which to correct the violation
- A memo from the zoning assistant dated 2/17/06 reviewing the previous Special Permits for the use as a fraternity house at that location, the cease and desist order, and the classification of the fraternity as a non-profit educational use.
- A letter to the Board from Town Counsel Alan Seewald dated 2/17/06 stating that the applicant did not provide sufficient information relevant to the claim that the operations of the Amherst fraternity house are primarily educational or not.
- A letter from the Building Commissioner Bonnie Weeks and the Assistant Building Commissioner Mark Snow dated 3/16/06 stating that the role of the ZBA in this case is to determine if the Building Inspector acted properly by issuing a Cease and Desist Order after the Special Permit for the continued use as a fraternity was denied.

At the hearing the petitioner submitted:

- A printout of the web page for the national Alpha Delta Phi fraternity. UMass Amherst is listed as one of the chapters.
- The "Zaipe" newsletter of the Alpha Delta Phi fraternity for the fall, 2004 & 2005. None of the donors listed or achievements noted were from the Amherst chapter.

**Site Visit:** March 21, 2006

Two members of the Board visited the site. (The third member had viewed the property several times before.) David Biddle, manager of the property, showed the fraternity house to the Board members. The Board was shown the three floors of the house (student rooms were not shown) plus the basement, the driveway and the dumpster in the back of the property

**Public Hearing:** February 23, 2006, continued to March 21, 2006

The Board was informed prior to the February 23<sup>rd</sup> hearing that Mr. Biddle was out of Town and that his lawyer was not available until after March 15<sup>th</sup>. Mr. Biddle did attend the February 23<sup>rd</sup> hearing, however, but was not prepared to give testimony without his lawyer. The Board continued the hearing until March 21, 2006.

At the March 21<sup>st</sup> hearing, Board Chair Ms. Tillona opened the hearing by stating that the Board would be dealing only with the Appeal of the actions of the Building Commissioner, that is, whether the Building Commissioner acted properly in issuing a Cease and Desist order to the petitioner. The Board would not be dealing with the non-renewal of a Special Permit for the fraternity to exist as a non-conforming use in a residential district, nor would it address the question of whether the fraternity's use is that of a non-profit educational organization, exempt from local zoning regulations. Ms. Tillona stated that if the petitioner has a quarrel with issues other than the issuance of the Cease and Desist order, the proper venue would be to appeal to District or

Superior Court, not the Zoning Board of Appeals.

The Board Chair noted for the record that the ZBA panel for the Special Permit FY2005-00040 hearing was composed of three members, none of whom were part of the ZBA panel for this Appeal hearing.

The petitioner was represented by attorney Mark Tanner. Mr. Tanner gave the following arguments:

- The petitioner incorrectly applied for a Special Permit which, according to MGL 40A, Section 3, the "Dover Amendment", he did not need. The Dover Amendment states in part that a non-profit educational institution's use cannot be regulated by zoning ordinances.
- If the applicant incorrectly applied for relief he did not need, then the Building Commissioner hasn't the authority to issue a Cease and Desist order.
- The Zoning Board of Appeals has the authority to decide whether the Special Permit application was appropriate, and whether the Cease and Desist was issued properly. No intermediate level of review of these two points is necessary.
- The applicant had no advice of counsel through the years of the Special Permit applications and approvals. In point of fact, he never needed a Special Permit if the property was used for non-profit educational purposes.

The Board made the following comments:

- The chain of events that the ZBA follows in this Appeal is – a Special Permit was applied for, the Special Permit was denied, the Building Commissioner then issued a Cease and Desist order as a result of the denial. This hearing is dealing only with the question of whether the enforcement actions of the Building Commissioner were proper.
- In the Board's view, Biddle, by applying for renewals of a Special Permit for a fraternity for many years, acknowledged that a Special Permit was needed. The courts can decide whether this particular fraternity's activity is primarily educational or not, and whether a Special Permit is necessary.
- The denial of the Special Permit will be in effect until the courts decide otherwise.
- Even under the Dover Amendment, a local authority can regulate for trash, parking, health and safety issues, which was the focus of the ZBA panels for years.
- If there are health and safety violations cited from Town inspections of the property, it is the responsibility of the property owner, a private citizen, to fix them. The National fraternity organization, which may be classified as non-profit educational, is not responsible for the local use of the property, which may be different than the national's orientation.

Mark Snow, Assistant Building Commissioner, stated that the Cease and Desist order of January 5, 2006 was based on the denial of the Special Permit application. He and the Building Commissioner consulted with the Town Attorney, who said that if the fraternity is operating in violation of the Zoning Bylaw, a Cease and Desist Order is the proper action for the Inspections Department, as the arm of the Building Commissioner, to take.

Bill Klaus, Inspector for the Fire Department, stated that he came to the hearing because he does not feel that it is safe for the boys to be living in the house, which was one of the issues that led to the denial of the Special Permit.

Mr. Biddle said that he wanted to address the educational mission of the fraternity. He submitted two copies of the alumni newsletter from 2004 and 2005, and a copy of the web-page for the fraternity. The Board noted that these documents related to the national organization, not to the local chapter, which was the focus of the Special Permit and the Cease and Desist order.

Bonnie Weeks, Building Commissioner, stated that the petitioner never requested a permit for anything other than housing for a fraternity. This use is not protected under the Amherst Zoning Bylaw. If the applicant has a problem with the way the Zoning Bylaw is written, then the correct process is to take the complaint to the courts, not to the ZBA. The Building Commissioner must enforce the Bylaw as it is written and enforce the actions of the ZBA (as required by Section 11.4 of the Zoning Bylaw and MGL Chapter 40A, Section 7, Enforcement.)

Ms. Tillona stated that the petitioner and attorney started at the wrong end of the process. If the petitioner wished to claim that the use as a fraternity was non-profit and primarily educational, or if they wished to change the Bylaw, that should have been done first, prior to the permitting process. The Zoning Board of Appeals does not make zoning policy, it only applies it, she stated.

The Board noted that the denial of the Special Permit is under appeal in the courts, and the applicant has the option of appealing any decision of the Building Commissioner or the Board of Appeals to the courts as well. Attorney Tanner and Mr. Biddle stated that they intend to do so.

Ms. Greenbaum made a motion to close the evidentiary part of the hearing. Ms. Ashby seconded the motion, and the vote to close the hearing was unanimous.

#### **Public Meeting:**

The Board discussed the Cease and Desist Order issued by the Building Commissioner's office. They found that the Building Commissioner properly issued the Cease and Desist Order following the denial of Special Permit FY2005-00040 and the resulting non-compliance with the Zoning Bylaw, as stipulated in Section 11.4 of the Amherst Zoning Bylaw.

#### **Zoning Board Decision:**

Ms. Greenbaum made a MOTION to deny the applicant's appeal of the Cease and Desist Order of the Building Commissioner for the continued occupation of the property by the Alpha Delta Phi fraternity following denial of Special Permit FY2005-00040. Ms. Ashby seconded the motion.

For all of the reasons stated above, the Board VOTED unanimously (3 to 0) to DENY the appeal of the Cease and Desist Order of the Building Commissioner for the continued occupation of the property by the Alpha Delta Phi fraternity following denial of Special Permit FY2005-00040, on the premises at 382 North Pleasant Street, (Map 11C, Parcel 118, R-G Zoning District), as requested in the application filed by Michaelle Biddle.

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ZINA TILLONA

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HILDA GREENBAUM

\_\_\_\_\_  
JANE ASHBY

FILED THIS \_\_\_\_\_ day of \_\_\_\_\_, 2006 at \_\_\_\_\_,  
in the office of the Amherst Town Clerk \_\_\_\_\_.  
TWENTY-DAY APPEAL period expires, \_\_\_\_\_ 2006.  
NOTICE OF DECISION mailed this \_\_\_\_\_ day of \_\_\_\_\_, 2006  
to the attached list of addresses by \_\_\_\_\_, for the Board.